

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

<p>GREGORY CASTRO,</p> <p style="padding-left: 100px;">Plaintiff,</p> <p>v.</p> <p>JO ANNE B. BARNHART,</p> <p style="padding-left: 100px;">Commissioner of Social Security,</p> <p style="padding-left: 100px;">Defendant.</p>	<p>)</p> <p>) No. CV-04-320-CI</p> <p>)</p> <p>) ORDER GRANTING PLAINTIFF'S</p> <p>) MOTION FOR SUMMARY JUDGMENT</p> <p>) AND DIRECTING AN IMMEDIATE</p> <p>) AWARD OF BENEFITS</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>
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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 21), submitted for disposition without oral argument on October 11, 2005. Attorney Kenneth L. Isserlis represents Plaintiff; Special Assistant United States Attorney Jeffrey H. Baird represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 14.) After reviewing the administrative record and the briefs filed by the parties, including the supplemental briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands for an immediate award of benefits.

Plaintiff, 29-years-old at the time of the administrative decision, filed an application for Social Security disability benefits on August 29, 2000, alleging onset as of March 27, 2000,

1 due to hospitalization for psychiatric treatment. (Tr. at 17.) On
2 May 9, 2002, he filed an application for Supplemental Security
3 Income (SSI) benefits; the applications were consolidated.
4 Plaintiff, a high school graduate, had relevant past work as a
5 server assistant, sales associate, janitor, special event staffer,
6 security guard and apprentice laborer. (Tr. at 17.) Following a
7 denial of benefits at the initial stage and on reconsideration, a
8 hearing was held before Administrative Law Judge R. J. Payne (ALJ).
9 The ALJ denied benefits; review was denied by the Appeals Council.
10 This appeal followed. Jurisdiction is appropriate pursuant to 42
11 U.S.C. § 405(g).

12 ADMINISTRATIVE DECISION

13 The ALJ concluded Plaintiff met the non-disability requirements
14 for a period of disability and was insured for benefits through the
15 date of his decision. Plaintiff had not engaged in substantial
16 gainful activity and had severe mental disorders, but the
17 impairments were not found to meet the Listings. The ALJ concluded
18 Plaintiff met the qualifications for disability during his
19 psychiatric hospitalization from March 27, 2000, to January 30,
20 2002, but because it was involuntary and court-ordered pursuant to
21 pending criminal charges, no benefits were due and payable to
22 Plaintiff. The ALJ also found after his release from the hospital,
23 Plaintiff has been medically compliant, stable on medication, and
24 without any delusions or paranoid thoughts. The ALJ concluded
25 Plaintiff retained the residual capacity to perform his past work or
26 make an adjustment to other work which exists in significant numbers
27 in the national economy. (Tr. at 22.) Thus, the ALJ found there
28 was no disability after January 30, 2002.

1 **ISSUES**

2 The question presented is whether there was substantial
 3 evidence to support the ALJ's decision denying benefits and, if so,
 4 whether that decision was based on proper legal standards.
 5 Plaintiff asserts the ALJ erred when he (1) relied on Plaintiff's
 6 expressed desire to work, (2) relied on the non-examining medical
 7 expert's unsupported opinion, (3) rejected Plaintiff's testimony,
 8 (4) rejected Dr. Lammers' opinion, (5) concluded Plaintiff could
 9 perform his past relevant work, and (6) relied on the Grids to
 10 conclude Plaintiff could perform other work which exists in
 11 significant numbers in the national economy. Finding issues one,
 12 two and four to be dispositive, the remaining are not addressed.

13 **STANDARD OF REVIEW**

14 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 15 court set out the standard of review:¹

16 The decision of the Commissioner may be reversed only if
 17 it is not supported by substantial evidence or if it is
 18 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 19 1097 (9th Cir. 1999). Substantial evidence is defined as
 20 being more than a mere scintilla, but less than a
 21 preponderance. *Id.* at 1098. Put another way, substantial
 22 evidence is such relevant evidence as a reasonable mind
 23 might accept as adequate to support a conclusion.
 24 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
 25 evidence is susceptible to more than one rational
 26 interpretation, the court may not substitute its judgment
 27 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
 28 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599
 (9th Cir. 1999).

The ALJ is responsible for determining credibility,

25 ¹The parties have not raised the issue of whether this matter
 26 should be reviewed under the medical improvement standard following
 27 a period of disability. See 20 C.F.R. § 404.1593 and 1594. Thus,
 28 this court does not address that standard.

1 resolving conflicts in medical testimony, and resolving
2 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
3 Cir. 1995). The ALJ's determinations of law are reviewed
4 *de novo*, although deference is owed to a reasonable
5 construction of the applicable statutes. *McNatt v. Apfel*,
6 201 F.3d 1084, 1087 (9th Cir. 2000).

7 SEQUENTIAL PROCESS

8 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
9 requirements necessary to establish disability:

10 Under the Social Security Act, individuals who are
11 "under a disability" are eligible to receive benefits. 42
12 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
13 medically determinable physical or mental impairment"
14 which prevents one from engaging "in any substantial
15 gainful activity" and is expected to result in death or
16 last "for a continuous period of not less than 12 months."
17 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
18 from "anatomical, physiological, or psychological
19 abnormalities which are demonstrable by medically
20 acceptable clinical and laboratory diagnostic techniques."
21 42 U.S.C. § 423(d)(3). The Act also provides that a
22 claimant will be eligible for benefits only if his
23 impairments "are of such severity that he is not only
24 unable to do his previous work but cannot, considering his
25 age, education and work experience, engage in any other
26 kind of substantial gainful work which exists in the
27 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
28 the definition of disability consists of both medical and
vocational components.

In evaluating whether a claimant suffers from a
disability, an ALJ must apply a five-step sequential
inquiry addressing both components of the definition,
until a question is answered affirmatively or negatively
in such a way that an ultimate determination can be made.
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
claimant bears the burden of proving that [s]he is
disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

25 ANALYSIS

26 1. Undisputed Facts

27 It is undisputed Plaintiff was hospitalized following a plea of
28 not guilty by reason of insanity to a charge of first-degree

1 robbery. (Tr. at 404.) That hospitalization continued for 22
2 months, followed by a conditional release to the community based on
3 a mental health treatment plan and approval of the release by
4 Whitman County Superior Court. (Tr. at 225, 231.) It also is
5 undisputed the ALJ concluded Plaintiff was disabled during the
6 period of his hospitalization, but ineligible to receive benefits
7 because of his placement in a public institution. (Tr. at 20.) It
8 is undisputed from the medical records Plaintiff complied with all
9 phases of his treatment program and that medication resolved the
10 symptoms of paranoid delusions. (Tr. at 327.) Finally, it is
11 undisputed Plaintiff indicated to treatment providers, both during
12 and after his hospitalization, that he desired to return to work
13 and/or an educational program. (Tr. at 220, 223.) The only
14 question is whether his mental and emotional health prevented his
15 handling the stress associated with normal work activity.

16 2. Rejection of Opinion of Treating Physician

17 Plaintiff asserts the ALJ improperly rejected the opinion of
18 the examining psychologist, Craig Lammers, Ph.D., without
19 explanation, a report he alleges was consistent with the opinions of
20 the psychiatrists who treated Plaintiff immediately before and after
21 his release from the psychiatric hospital. Dr. Lammers stated with
22 respect to Plaintiff's employability:

23 As noted above, Mr. Castro is presenting as rather
24 symptom-free at this time. While one could thus assume
25 that he is capable of employment, in my opinion this would
26 be extremely premature to request this of him. He has
27 very recently been discharged from an involuntary
28 hospitalization that lasted for almost two years. This
would suggest that his symptoms were difficult to manage
and that it took a rather prolonged period of time for him
to obtain emotional stability. While he is presently
symptom-free of his psychotic disorder, I would describe
him as rather fragile as he tries to make an adjustment

1 back into society following his hospitalization. Although
2 symptom-free, it does not necessarily indicate that he is
3 capable of coping with the demands that employment would
4 place on him. His performance on the MMPI-2 would suggest
5 that he is still experiencing periods of intense anxiety
6 accompanied by very low confidence, social discomfort, and
7 some isolation. His history would suggest that the
8 symptoms have been somewhat present for him dating back to
9 his high school years, and there is also a very definite
10 pattern that his symptoms are exacerbated during periods
11 of stress and tension. Thus it is most likely that his
12 trying to seek and maintain employment would create
significant stress for him, and thus increase the
likelihood of a reoccurrence of his psychotic symptoms.
Mr. Castro's focus during this time should be maintaining
his emotional stability through stable housing, ongoing
treatment, and frequent contact with his support system.
Again, requiring more of him at this time would more
likely than not lead to some reoccurrence of his above
noted symptoms. If Mr. Castro were to remain symptom-free
for a rather prolonged period of time, it would most
likely increase a positive prognosis as to his abilities
to find and maintain employment sometime in the future.

13 (Tr. at 356-357.) In an accompanying psychiatric review. Dr.
14 Lammers indicated Plaintiff's condition met the Listings under
15 12.03, psychotic disorders. (Tr. at 361.)

16 Case law requires the opinions of examining physicians, when
17 uncontroverted, be rejected only with "clear and convincing"
18 evidence. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If
19 controverted, the reasons must be specific and supported by the
20 record. *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453,
21 1463 (9th Cir. 1995). There is no other examining or treating
22 physician who contradicts Dr. Lammers' diagnosis or opinion. Thus,
23 the ALJ must provide clear and convincing reasons for rejecting it.

24 The ALJ referred to Dr. Lammers' findings in his opinion
25 (reference to Exhibit 15F, Tr. at 18). He also noted Plaintiff was
26 living independently with a roommate and his daily activities
27 consisted of working around his trailer park, walking, watching
28 television and weekend dirt-biking and that although he felt he had

1 too much time on his hands, he did not feel capable of working. The
2 ALJ noted examination assessments since his release have confirmed
3 medication compliance, stability and symptom-free status. (Tr. at
4 21, 333-47.) The ALJ relied on Plaintiff's expressed representations
5 he intended to return to work and independent living, that he fully
6 understood his condition and its effect on his cognitive abilities,
7 and that, as long as he was medically compliant, he should remain
8 healthy with no exacerbation of delusional symptoms. (Tr. at 21.)
9 Finally, the ALJ stated treatment records from Spokane Community
10 Mental Health (SCMH) providers demonstrated continued stability and
11 compliance with the medication protocol.

12 Plaintiff argues the ALJ improperly considered his desire to
13 return to work, citing *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir.
14 1978), that held a willingness to engage in rehabilitative activity
15 is clearly not probative of a present ability to do so. Dr.
16 Lammers' opinion and the providers at SCMH agreed Plaintiff,
17 although willing, was not able to handle the stress of full time
18 work upon his immediate release from hospitalization. (Tr. at 333,
19 334, 350.) Thus, although Plaintiff's statements offer some
20 support for his ability to work, they are not conclusive by
21 themselves, particularly when viewed against the medical treatment
22 record. *Cox*, at 991. Additionally, the fact Plaintiff was
23 responding to treatment does not provide clear and convincing
24 reasons for disregarding Dr. Lammers' opinion. *Rodriguez v. Bowen*,
25 876 F.2d 759, 763 (9th Cir. 1989). The ALJ must consider both the
26 objective and subjective findings of the treating / examining
27 physicians. *Id.* at 762. No examining or treating physician opined
28 Plaintiff was ready to return to work the day his hospitalization

1 ended. Accordingly, the opinions of the treating and examining
2 physician must be credited as true. *Lester v. Chater*, 81 F.3d 821,
3 834 (9th Cir. 1995).

4 3. Opinion of Consulting Physician

5 Plaintiff contends the ALJ improperly relied on the testimony
6 of the medical expert, Dr. Bostwick. Dr. Bostwick rejected Dr.
7 Lammers' findings on three grounds: First, Dr. Lammers was under a
8 faulty belief Plaintiff's criminal charge involved burglary rather
9 than robbery. (Tr. at 415.) Second, his 22-month stay in the
10 hospital was for legal reasons, not medical. Third, Dr. Bostwick
11 noted the specific one-seven profile demonstrated by the MMPI
12 administered by Dr. Lammers did not reflect paranoia, but rather a
13 neurotic profile showing obsessive worry, nervousness, or anxiety
14 and that the description of extreme limitations was not reflected in
15 the medical history. (Tr. at 415.)

16 The opinion of a non-examining physician, here that of Dr.
17 Bostwick, may be accepted as substantial evidence if it is supported
18 by other evidence in the record and is consistent with it. *Andrews*
19 *v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Lester v. Chater*, 81
20 F.3d 821, 830-31 (9th Cir. 1995). The opinion of a non-examining
21 physician cannot by itself constitute substantial evidence that
22 justifies the rejection of the opinion of either an examining
23 physician or a treating physician. *Lester*, at 831, citing *Pitzer v.*
24 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990). Cases have upheld
25 rejection of an examining or treating physician based in part on the
26 testimony of a non-examining medical advisor; but those opinions
27 have also included reasons to reject the opinions of examining and
28 treating physicians that were independent of the non-examining

1 doctor's opinion. *Lester*, at 831, citing *Magallanes v. Bowen*, 881
2 F.2d 747, 751-55 (9th Cir. 1989) (reliance on laboratory test
3 results, contrary reports from examining physicians and testimony
4 from claimant that conflicted with treating physician's opinion);
5 *Andrews*, 53 F.3d at 1043 (conflict with opinions of five non-
6 examining mental health professionals, testimony of claimant and
7 medical reports); *Roberts v. Shalala*, 66 F.3d 179 (9th Cir 1995)
8 (rejection of examining psychologist's functional assessment which
9 conflicted with his own written report and test results). Thus,
10 case law requires not only an opinion from the consulting physician,
11 but also substantial evidence (more than a mere scintilla, but less
12 than a preponderance), independent of that opinion which supports
13 the rejection of contrary conclusions by examining or treating
14 physicians. *Andrews*, 53 F.3d at 1039.

15 Dr. Bostwick's rationale is not consistent with the medical
16 record. Even assuming Dr. Lammers was under a mistaken impression
17 Plaintiff's criminal charge involved burglary rather than robbery,
18 there is no medical rationale that would support a different
19 diagnosis or residual findings because of the discrepancy in his
20 misunderstanding of the criminal charge.

21 Although Plaintiff expressed a desire to obtain full time work
22 after his release, his ability to cope with the stress associated
23 with work was questioned by medical reports and findings. During
24 his second visit to Spokane Community Mental Health (SCMH) in May
25 2002, some four months after his release from hospitalization,
26 without consideration of any stress resulting from job performance,
27 Plaintiff expressed to SCMH providers anxiety and stress from
28 dealing with ongoing events, e.g. evaluation for SSI, child support

1 issues, setting up goals, and finding a way to live his life so that
2 he could deal with the stress. (Tr. at 334.) Paxil was increased
3 and his global assessment of functioning was assessed at 51-60,
4 indicating a range of moderate impairment. DIAGNOSTIC AND STATISTICAL
5 MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV), at 32 (1995). The
6 increased anxiety also was noted by Dr. Lammers who conducted his
7 examination at the same time.

8 Dr. Bostwick's opinion that Plaintiff's hospitalization was due
9 to legal, rather than emotional issues, is contradicted first by the
10 ALJ's decision to find disability during that period. Second,
11 although it appears from the record, Plaintiff's hospitalization was
12 extended for an additional four months while he awaited court
13 approval of his community placement, the term of his hospitalization
14 was governed by RCW 10.77. (Tr. at 196.) There was no pre-set
15 "term" of hospitalization imposed by the court; Plaintiff was to be
16 hospitalized until he was medically capable of meeting the terms of
17 the conditional release. Plaintiff applied for conditional release
18 in June 2001. (Tr. at 221.) The court agreed to general conditions
19 of release on August 14, 2001. (Tr. at 231.) Clinic notes indicate
20 later treatment involving "redirection" following conflicts with
21 other patients. (Tr. at 273, 274.) Plaintiff was reported to be
22 stable and ready for conditional release on September 26, 2001, but
23 was awaiting a placement in the community and completion of the
24 proper notification required by the court. (Tr. at 277, 278, 282.)
25 From the end of September to Plaintiff's release in January, his
26 condition remained stable while he participated in hospital
27 programs. (Tr. at 277-292.) Thus, it appears his hospitalization was
28 extended only for an additional four months due to court

1 requirements.² Nonetheless, the ALJ concluded Plaintiff remained
2 disabled until his release in January 2002.

3 Finally, Dr. Bostwick opined the MMPI results were not
4 indicative of paranoia, but excessive worry and anxiety. Dr.
5 Lammers noted MMPI results indicated "periods of intense anxiety,
6 low confidence, social discomfort, and isolation." (Tr. at 356.)
7 Thus, Dr. Lammers' opinion reflected a correct reading of the MMPI.
8 Additionally, the working diagnosis for medical providers at SCMH in
9 April and May 2002 included delusional disorder, persecutory type,
10 substance abuse in remission, anxiety disorder with panic attacks,
11 and social phobia. (Tr. at 333, 334.) Moreover, Plaintiff's
12 release to the community was pursuant to a recommended mental health
13 treatment plan that included further examination and treatment,
14 counseling, and continued medication. Thus, Dr. Bostwick's opinion
15 was not consistent with the medical record or supported by it.
16 Accordingly,

17 **IT IS ORDERED:**

18 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
19 **GRANTED**; the matter is **REMANDED** for an immediate award of benefits,
20 based on an onset date of January 31, 2002.

21 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
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23 ²Although not necessary to the court's opinion based on the
24 analysis of the first issue above, evidence submitted post-hearing
25 to the Appeals Council from the treating and examining physicians,
26 indicates continued disability upon release based on a need for
27 transition back to the community without the possibility of relapse.
28 (Tr. at 404-406, 400-403.)

1 **Rec. 21)** is **DENIED**.

2 3. Any application for attorney fees shall be made by
3 separate motion.

4 4. The District Court Executive is directed to file this
5 Order and provide a copy to counsel for Plaintiff and Defendant.
6 The file shall be **CLOSED** and judgment entered for Plaintiff.

7 DATED November 29, 2005.

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9 S/ CYNTHIA IMBROGNO
10 UNITED STATES MAGISTRATE JUDGE
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